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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 135

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

Respondent,

A. J. GOERIG and CLYDE PHILP, individuals and copartners,

Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The District Court entered judgment against petitioners and the Continental Casualty Company, their surety. On the appeals of all of such defendants, the judgment was affirmed by the Court of Appeals.

The petition of the Continental Casualty Company for writ of certiorari has already been denied by the Supreme Court. That company has now filed a petition for rehearing.

Throughout the petition and supporting brief, including the questions presented and argument, petitioners have persistently failed to mention or consider certain facts which were found to exist by the District Court and the Court of Appeals, and which are as prominent in this case as the view of a mountain from a plain.

We refer particularly to promises made by Mr. Sam Macri, one of petitioners, to respondent with respect to compensation to be paid to respondent for labor and materials furnished by him, in addition to the amounts which would ordinarily be required in the performance of the subcontract. These promises are stated fully hereafter in the statement of the case.

By the terms of the subcontract entered into between petitioners and respondent, the latter agreed to furnish all labor and necessary equipment to do all of the concrete work, including the erection of the wooden forms and the installation of reinforcing steel. It was also agreed in the subcontract that all of the excavating and all of the materials necessary for the performance of the subcontract by respondent, were to be furnished by petitioners, with the exception of the form wire, nails, and curing material. It was further agreed therein that the excavating was to be done, and the materials were to be supplied by petitioners in accordance with the

plans and specifications and in proper time for performance of the subcontract by respondent (R. 99, 100). The excavation required of petitioners by this instrument included what is called fine grading, which consisted in hand grading to specific dimensions after a power shovel had removed earth to within 3 to 5 inches of such dimensions.

Both the District Court and the Court of Appeals found that from the time respondent commenced to perform the subcontract until his work was completed petitioners were guilty of breaches of their obligations under the subcontract in certain respects which are well stated in the opinion of the Court of Appeals in these words (173 Fed. 2d 5, 7):

> "The Court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found willful and negligent and they continued and persisted throughout the entire performance of the subcontract."

It will be observed in the last sentence of that quotation that both courts found that these breaches of petitioners were willful and negligent and continued throughout the performance of the subcontract by re-

spondent. This finding is completely ignored by petitioners.

The promises of Mr. Macri, which are wholly disregarded in petitioners' brief, were made in two conversations with Mr. Schaefer at meetings of these men at the scene of this project. These meetings were made necessary by the fact that petitioners were not performing their obligations under the subcontract.

At the first meeting, on April 29, 1944, approximately six weeks after the subcontract was executed, the two men went into the field and examined a number of excavations. All proved to be defective. Mr. Macri then asked Mr. Schaefer to do the fine grading, saying that he would pay for it, but Mr. Schaefer refused to undertake the work and asked Mr. Macri to have sufficient men there so he wouldn't be delayed, that the excavations be done according to specifications, and that ample lumber be supplied in time in order that respondent's men could pour not less than 20 yards of concrete per day. Mr. Schaefer reminded him of a previous promise to so perform his obligations that the respondent would be off the job by September 15th. Mr. Macri replied, "You'll be out of here by September 15th, there isn't gonna be anybody lose any money on our job; we'll get this thing straightened out and get going. * * * I'll pay you for the expense of excavating that you do here (R. 221 to 224)." Mr. Schaefer's reply was, "Who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, * * * instead of

to specification, or stripping the forms out of these holes, doing the necessary excavating to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead?" Mr. Macri said, "I'll pay you for all the extras, just get going." Mr. Schaefer replied, "You're going to pay for all additional cost and expense." Mr. Macri then said, "I told you that before." Mr. Schaefer then added, * * * "You're going to have the necessary men and equipment in here, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day (R. 225 to 227)." Mr. Macri then said, "Well, that's it, that's all right (R. 227)."

Respondent returned to the project on May 19th and found no work going on and no lumber. The side walls still required additional digging to accommodate the forms and there were no excavations ready for forms. Respondent then instructed his superintendent to take all of his men back to Portland with the exception of two (R. 279, 280, 282).

Mr. Schaefer met Mr. Sam Macri again on June 15th, on the project. There was still nothing being done. The shovel was broken down and was in the yard. Petitioners did not have a hand-excavating crew on the job. In fact, there was no one on the job (R. 284, 285, 286). At that time enough forms had been prepared by respondent to permit the assembly of about 72 to 75 structures, the term used to designate the forms when ready to receive concrete. There were no excavations ready for the placing of the structures, however, and,

in fact, none was ready to receive forms until June 29th.

At the meeting of June 15th another conversation was held between Mr. Macri and Mr. Schaefer which was substantially similar to that of April 29th. After discussing the general situation, Mr. Schaefer said to Mr. Macri, "We won't be through with this job by September 15th." Mr. Macri replied, "Nobody's lost any money on my job. We'll be out by September 15th. This little excavating, you go ahead and do it. We'll pay for it." Mr. Schaefer then said, "That isn't all you're going to pay for. You're going to pay all the costs, all expenses, all the extras." Mr. Macri replied, "Well, I told you that before; quit arguing. * * * You're not going to have to wait for anything any more. You just get back here and get going (R. 286, 287)."

The District Court found that these conversations occurred and that respondent relied upon the statements of Mr. Sam Macri (R. 102, 103, 2213-2215). While the Court of Appeals did not expressly approve such findings, it clearly adopted them by implication. The latter court said in its opinion (173 Fed. 2d 5, 7, 8):

> "The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to continue performance and to perform some of the work the Macris were to do, and that Schaefer would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that 'there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra

burdens imposed upon (Schaefer) by the Macris' breaches.' "

* * * * *

"The district court held that there was an 'implied agreement or quasi-contract' to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will not weight the evidence in such a case. Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. We cannot say that this finding is clearly erroneous.

"Since the court found that the subcontract was willfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements, which were intended to induce reliance."

In spite of diligent effort on his part, respondent was not able to complete the performance of the subcontract until April 1945 because of the willful and negligent failure of petitioners to perform the obligations imposed on them by the subcontract. Exhibit 51 (R. 572, 578, 586), which is considered in some detail under heading No. 2 in this brief, and the testimony of two witnesses, one of whom was wholly disinterested, indicates clearly that respondent could have fully performed the subcontract in from 3½ to 4 months under normal conditions (R. 464, 572, 586, 1160-1162).

Petitioners insist that respondent has been seeking the recovery of damages for breach of contract. It is clear, however, that the only count in the amended complaint on which the District Court permitted a recovery is the one based on quantum meruit (R. 103, 109, 110). The opinion of the Court of Appeals indicates beyond doubt that both courts regarded the judgment as based on the reasonable value of the labor and materials furnished by respondent plus overhead and profit, and not upon damages for breach of contract. This is plain in view of the language already quoted from the opinion and the following (173 Fed. 2d 5, 8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

It is true that the District Court found that there was no express contract, or meeting of the minds, that respondent was to do what fine grading was required by the defective conditions of the excavations. Respondent stated more than once that he did not wish to assume the obligation of fine grading the excavations; consequently, there was no express contract that he would do that work. He did perform much of it, however, at the request of petitioners and with their knowledge, because he had to do it to get his own work done. As a result, an implied-in-fact contract that petitioners would pay for such work could and did arise, and the mere fact that respondent declined to promise to perform it did not prevent the creation of an implied-in-

fact agreement when he did perform part of it under necessity.

Petitioners declare: "Schaefer repeatedly stated that he refused absolutely to do any other work than what his subcontract called for (Petition 10, Brief 25)." It is true that respondent refused to promise to perform any obligations other than those set forth in the subcontract, but it is equally true that he did a tremendous amount of work which he was not obligated to do by the subcontract under such circumstances as to give rise to an implied-in-fact promise by petitioners to pay for it. He was compelled to do the extra work in order that he might perform his own obligations under the subcontract. Petitioners stood by and watched him do it, accepted such work without protest, and in fact urged him to go ahead and do it. Petitioners received full benefit from the extra work done by respondent by being paid by the United States Government.

It is acknowledged that respondent did not keep records from which the exact amount or cost of the extra work could be determined, the reason for such failure being that it was physically impossible in most instances for him to do so. There is ample testimony in the record, however, to permit a determination with reasonable certainty of the reasonable value of the extra labor and materials furnished by respondent. Both the District Court and the Court of Appeals concluded that the amount of respondent's increased costs was established with reasonable certainty. In view of the fact that petitioners still contend that there was insufficient

proof insofar as the amount of recovery was concerned, this question will be more fully considered in the argument under heading No. 2 in this brief.

Petitioners declare that there is a manifest duplication of overhead and profit in the judgment (Brief 4). A study of the calculations appearing under heading 2 of this brief will demonstrate that this is not true.

Petitioners say that there was an overrun of concrete of 14.5% brought about by admittedly unskillful subcontract operations (Brief 4). This is an entirely unfair and unjustifiable interpretation of the testimony relied upon (R. 1205, 1207). It is admitted that there was an overrun of 14.5%, that is, that 14.5% more concrete was poured than the estimate made by government engineers, but it is emphatically denied that respondent had anything to do with such overrun beyond an insignificant amount.

The testimony evidently relied upon by petitioners (R. 1205, 1207) was given by Mr. Bufton. He said that spillage, and small quantities of concrete wasted at the end of the day because there is no place to put it, should not exceed from 2% to 5% of the total quantity poured. There was very little spillage on this project, less than one yard, and very little waste (R. 557, 558), and it is therefore clear that the total quantity of overrun falling into these two categories was only a very small fraction of the 2% tolerance approved by Mr. Bufton.

The forms constructed by respondent of wood panels for the reception of the concrete, were assembled ac-

cording to specifications (R. 477, 478, 480). The real cause of the overrun was the excessive quantity of concrete required to fill the voids resulting from the over-excavation done by petitioners' own men (R. 557). In a number of instances the excavations were too deep; this meant that excessive quantities of concrete were required to bring the floor of the finished structures up to the proper grade (R. 456, 677). In a great many instances an earth wall served as part of a form in place of a wood panel; many of these walls were overexcavated or were out of line and as a result excessive quantities of concrete were used to fill these voids (R. 457, 591, 677, 679). The testimony establishes and both courts below found that one of the most serious defects in petitioners' performance was their failure to excavate properly (R. 100, 220, 457).

Petitioners were paid by the Government on the basis of 1,356 yards, the number estimated by engineers of the Bureau of Reclamation. We have used exactly the same number in our calculations under heading 2 of this brief in which it is demonstrated that the evidence establishes with reasonable certainty the amount which respondent is entitled to recover.

ARGUMENT

Summary of Argument

1. Respondent is entitled to recover from petitioners and the Continental Casualty Company in quantum meruit, either the reasonable value of all of the labor

and materials furnished by respondent to petitioners, less what respondent has already been paid, or the reasonable value of the extra labor and materials furnished by respondent plus the sum remaining unpaid on the contract (Petitioners' propositions 1, 2, and 3, Brief 25).

2. The evidence establishes with reasonable certainty the amount which respondent is entitled to recover (Petitioners' proposition 4, Brief 31).

3. The subcontract provision with respect to delays caused by the principal contractors, now petitioners, is no bar to this action (Petitions' proposition 5, Brief 35).

4. The principle which requires anyone injured by a breach of contract to make a reasonable effort to minimize his damage, does not preclude a recovery in this action (Petitioners' proposition 6, Brief 38).

5. Respondent is entitled to a decision that he has capacity to maintain this action (Petitioner's proposition 7, Brief 39).

6. The reasons given by the Court of Appeals in its opinion, if inappropriate, do not form a proper basis for the issuance of a writ of certiorari (Petitioners' proposition 8, Brief 41).

7. The form of the judgment is not such as to justify the issuance of a writ of certiorari (Petitioners' proposition 9, Brief 43).

1.

RESPONDENT IS ENTITLED TO RECOVER FROM PETITIONERS AND THE CONTINENTAL CASUALTY COMPANY IN QUANTUM MERUIT, EITHER THE REASONABLE VALUE OF ALL OF THE LABOR AND MATERIALS FURNISHED BY RESPONDENT TO PETITIONERS, LESS WHAT RESPONDENT HAS ALREADY BEEN PAID, OR THE REASONABLE VALUE OF THE EXTRA LABOR AND MATERIALS FURNISHED BY RESPONDENT PLUS THE SUM REMAINING UNPAID ON THE CONTRACT

The argument under this heading is directed to petitioners' propositions 1, 2, and 3 (Brief 25).

As indicated in the opinion of the Court of Appeals, there are three separate legal theories which fully sustain the right of respondent to recover in quantum meruit. It will be recalled that the court said (173 Fed. 2d 5, 8):

> "Whether the theory is called implied-in-fact contract, quasi-contract, or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit."

Each of these three theories will be briefly stated herein, with the authorities upon which it is based. Respondent contends that each of these, standing alone, is sufficient to warrant the denial of the writ of certiorari in this instance.

A.

Respondent is entitled to recover from petitioners and the Continental Casualty Company in quantum meruit, the reasonable value of the labor and materials furnished by him less the amount he has received, due to the willful breaches of the subcontract by petitioners.

The basis of this contention is that the District Court and the Court of Appeals found the following facts: (1) Petitioners were guilty of willful and negligent, material breaches of the subcontract through the performance of the work by respondent, in the respects mentioned in the statement of the case. (2) Respondent furnished labor and materials and performed services for petitioners at their request of the reasonable cost and value stated in the findings of fact of the District Court (R. 103, 104).

It is established beyond any doubt that where one of the parties to a contract is guilty of a material breach, the injured party may recover the reasonable value of the labor and materials which he furnished to the other party, in quantum meruit.

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2).

Great Lakes Construction Co. v. Republic Creosoting Co., 139 Fed. 2d 456 (C.C.A. 8).

McDonald v. Supple, 96 Or. 486, 190 P. 315.

Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034.

Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P. 2d 226.

Schuehle v. City of Seattle, 199 Wash. 675 92 P. 2d 1109.

Bishop v. Ryan Construction Co., 106 Wash. 254, 180 P. 126.

Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4).

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2).

It is respectfully contended on behalf of respondent that these decisions govern this situation.

Assuming, therefore, that respondent is entitled to recover in quantum meruit, such recovery is not limited to his actual cash expenditures for labor and materials, but he may recover, in addition, reasonable overhead and profit. In other words, respondent is entitled to recover the amount petitioners would have been compelled to pay in the open market for the labor and materials which were actually furnished by him. This is established by the following authorities:

Comment c following Section 347 of the Restatement, declares:

> "If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered."

There is an excellent discussion of this subject in 5 Williston on Contracts, Section 1480.

This measure of recovery was approved in the following cases:

United States v. Zara Contracting Co., 146 Fed. 2d 606 (C.C.A. 2). The court held, in the language of the Restatement, that the plaintiff's performance was to be valued by the amount the services and materials supplied by the plaintiff, "could have been purchased from one in the plaintiff's position" at the time they were supplied. A judgment for the plaintiff was increased and affirmed.

Schwasnick v. Blandin, 65 Fed. 2d 354 (C.C.A. 2). In reliance upon the same section of the Restatement and 5 Williston on Contracts, Section 1480, the court held that the plaintiff could recover the reasonable value of his services, "measured by what he could have got for them in the market, and not by their benefit to the promisor."

Sofarelli Bros. v. Elgin, 129 Fed. 2d 785 (C.C.A. 4). The court here allowed recovery of overhead.

Nelson v. City of Seattle, 180 Wash. 1, 38 P. 2d 1034. The court allowed fifteen per cent for profit, "the going rate on City contracts."

If an injured plaintiff is entitled to recover the market value of the labor and materials furnished by him, it is clear that overhead and profit should be included in the sum awarded him, inasmuch as any one offering to furnish labor and materials in the open market naturally includes overhead and profit in the amount of his offer.

It is evidently asserted by petitioners in their proposition No. 1, as it has been in the past, that there can

be no recovery in quantum meruit in this case for these reasons: (1) Assuming that petitioners were guilty of continuing total breaches of the subcontract, respondent elected to continue his performance and thereby waived his right to regard the breaches as total, and rendered them partial breaches of contract. (2) There can be no recovery in quasi contract following the waiver of such total breaches, and the only remedy available to respondent for the partial breaches of contract is a recovery of damages against petitioners measured by the increased cost of respondent's performance due to such partial breaches of the contract.

Respondent contends that the principle relied upon by petitioners should not be applied in this case for the reason that the breaches of contract by petitioners were willful.

It is an established principle of contract law, having particular application to construction contracts, that a builder is entitled to recover the contract price even though there are some defects or omissions in his performance, if it can be said that he has substantially performed the contract. The owner is then entitled to sufficient compensation from the builder to permit the defects to be corrected or the omissions to be supplied.

> 3 Williston on Contracts, Sections 805 and 842.
> *Patrick v. Bonthius,* 13 Wash. 2d 210, 124 P. 2d 550.

There is an exceedingly important limitation upon this principle, however. It is said by the text writers

and it has been repeatedly held by the courts that the principle does not apply if the builder willfully fails or refuses to perform the contract in accordance with the plans and specifications.

> 3 Williston on Contracts, Section 805.
> *Golwitzer v. Hummel*, 201 Ia. 751, 206 N.W. 254.
> *Typhoon Air Conditioning Co., Inc. v. Fried*, 147 Pa. Super. 605, 24 Atl. 2d 926.
> *Turner v. Henning*, 262 Fed. 637 (Ct. App. D.C.).
> See also *Patrick v. Bonthius*, supra.
> Restatement of the Law of Contracts, Section 357.

The significance of these principles relating to the effect of a willful breach of contract, may be briefly stated:

By reason of their willful breaches of contract, petitioners would not have been entitled to rely upon the doctrine of substantial performance if respondent had not fully performed, and could not, therefore, have secured full performance from respondent in accordance with the terms of the contract, and limited his recovery to damages in an amount sufficient to correct the defects or supply the omissions in petitioners' performance.

That being so, petitioners' only remedy for a failure of performance by respondent would have been an action based upon Section 357 of the Restatement, and their recovery would have been the net benefit conferred by petitioners upon respondent. But the net benefit to respondent was a minus quantity and the principles of quasi contract which give a remedy when necessary to

avoid an unjust enrichment, declare that respondent should recover in quantum meruit from petitioners the difference between the benefits conferred by each of these parties upon the other.

B.

Respondent is entitled to recover from petitioners the amount of his claim, for the reason that an injustice can be avoided only by enforcement of petitioners' promises to pay respondent's costs and expenses, and petitioners are estopped to assert that their promises are not binding upon them, such recovery being in quantum meruit.

This contention is based upon the following established facts: From the beginning, petitioners knew that they were not performing their duties in accordance with the specifications. They knew, furthermore, that respondent was refusing to perform any of petitioners' work and that he was actually unable to do his own until petitioners had completed what they were required to do. In this state of affairs, Mr. Sam Macri promised "to do better." He also promised on two occasions to pay the respondent's costs, but it is not entirely clear whether he promised to pay all of respondent's costs and expenses, or the additional costs and expenses made necessary by petitioners' failure to perform their obligation. There is evidence supporting each view, but it is entirely immaterial which is adopted, as the governing rules of law and extent of recovery are the same in each instance. The District Court intimated that he inclined

toward the latter (R. 103, 2214, 2215), but he actually decided that respondent should recover all costs and expenses less what he had already received (R. 103, 104, 112). Hereafter these promises will be stated to be simply, "to pay respondent's costs and expenses."

Petitioners should reasonably have expected that the promises to pay respondent's costs would induce respondent to do all of petitioners' work which they left undone, in order that respondent might make certain that he could fully perform all of his own obligations. Petitioners knew that respondent himself had executed a performance bond and that he would have been liable to both petitioners and the surety named in such bond in the event of a default on his part. In that event, either the surety or petitioners would have taken over respondent's obligations and performed his contract, with resulting loss of profits and prestige to respondent.

In reliance upon these promises, respondent continued to perform his duties and, in fact, completed everything he was required to do. In so carrying out his own work, respondent performed a considerable portion of petitioners' duties which increased his costs to an amount between two and three times greater than would have been necessary if petitioners had performed according to specifications. Petitioners did not "do better," and performance of the prime contract with the government would have been delayed far beyond its actual completion, if respondent had not done a considerable portion of petitioners' work. Petitioners, of

course, received the full benefit of the labor and materials furnished by respondent.

This theory of respondent is based upon the principle stated in Section 90 of the Restatement of the Law of Contracts in these words:

> "*Promise reasonably inducing definite and substantial action.* A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."
>
> 1 Williston on Contracts, Section 139.
> 3 Williston on Contracts, Sections 679 and 689.

That principle was applied in the following decisions:

Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783.

Fried v. Fisher, 328 Pa. 497, 196 Atl. 39.

Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P. 2d 667.

Alameda County Title Insurance Co. v. Panella, 218 Cal. 510, 24 P. 2d 163.

In *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. 2d 1034, 1041, the court said, with respect to a promise made without consideration:

> "Nelson (the general contractor) was anxious to have the work progress with as great speed as possible. Hence his proposal to pay half the rental of the additional tug and allow Vigilant (the subcontractor) the use of the scow without charge. Vigilant having acted upon the oral agreement, Nelson could not thereafter withdraw from it."

It is evident that the facts of this case bring it within the operation of the principle stated in Section 90 of the Restatement and the cases cited. The result is that the promises of petitioners to pay respondent's costs are binding on them, and since they have not performed those promises, respondent is entitled to pursue all appropriate remedies for breach of contract.

Petitioners have paid only about one-third of respondent's total costs and expenses shown by Exhibit 63, the audit which formed the basis for the judgment of the District Court (R. 104, 112, 1241, 1252), and, consequently, none of his extra costs and expenses. It is clear, therefore, that their failure to perform their oral promises constitutes a total breach of such promises within the meaning of Section 317 of the Restatement.

That being true, respondent is entitled to a recovery in quantum meruit, by reason of the principle stated in Section 347 of the Restatement, based on the value of the labor and materials furnished by him.

The correct amount of respondent's recovery is demonstrated in the discussion of contention No. 2 in this brief, on the basis of each view of the testimony with respect to the extent of the promises of petitioners. If they promised to pay all of respondent's costs and expenses, the latter should recover the reasonable value of all labor and materials furnished by him, less what he has already received. If petitioners promised to pay his additional costs and expenses, respondent should recover the reasonable value of all additional labor and materials furnished by him, plus the portion of the con-

tract price remaining unpaid. In either event, he is entitled to overhead and profit in amounts proportionate to his recovery, for the reasons previously stated.

C.

Respondent is entitled to recover from petitioners the reasonable value of the extra labor and materials furnished by him, on the basis of an implied-in-fact agreement to pay for them.

This theory is based upon these established facts: From the beginning petitioners knew that they were not performing their obligations under the subcontract according to the specifications and knew that the respondent was doing a considerable portion of petitioners' work. At the meetings of April 29th and June 15th, 1944, Mr. Macri asked Mr. Schaefer to perform a substantial portion of the work required to be done by petitioners, particularly the fine grading. Mr. Schaefer refused to take over the fine grading. Mr. Macri promised, "to do better" after these meetings, but he failed to show any improvement. It was still necessary, therefore, that respondent do a substantial amount of work required by the subcontract to be done by petitioners, if the prime contract was to be finished within a reasonable time. Respondent, accordingly, continued to do petitioners' work and this was fully known to the latter. Petitioners accepted this work and secured the full benefit of it in the form of compensation from the Bureau of Reclamation. The work done by respondent beyond that which would ordinarily have been required

of him by the subcontract, was not a gratuity on his part. He expected full compensation for it, and a reasonable man in the position of Mr. Macri should have understood that such was respondent's expectation.

In this situation it is believed that the authorities unanimously declare that respondent is entitled to recover from petitioners the reasonable value of the extra labor and materials furnished by him, on the basis of an agreement implied in fact.

Section 72 of the Restatement of the Law of Contracts contains these words:

> "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:
>
> "(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
>
> * * * * *
>
> "(2) Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance * * *."

In 1 Williston on Contracts, Section 36, the principle is stated in this manner:

> "Even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable."

See also 1 Williston on Contracts, Sections 36 A, 91, and 91 A.

The decisions fully support the principles set forth in the Restatement and Williston on Contracts.

Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 159.

Roberts v. Gerlinger, 124 Or. 461, 263 P. 916.

Vaught v. Charleston National Bank, 62 Fed. 2d 817 (C.C.A. 10).

Hooper v. O. M. Corwin Co., 199 Wis. 139, 225 N.W. 822.

Collins v. Lewis, 111 Conn. 299, 149 Atl. 668.

Callan v. Andrews, 48 Fed. 2d 118 (C.C.A. 2).

Respondent acknowledges that there can be no implied-in-fact contract contrary to an express contract. It is suggested by petitioner that there can be no implied-in-fact agreement on the part of petitioners to pay respondent's costs or any part of them, for the reason that the expressed intentions of these parties are inconsistent with such an implied agreement. Petitioner now relies particularly upon Mr. Schaefer's expressed intention that he would not take over the fine grading of the excavations.

Petitioners have quoted (Petition 10) from that portion of the opinion of the District Court, in which the court said that he could not find that there was a meeting of the minds or an express contract that Mr. Schaefer was to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid the reasonable value of all his costs. The basis of this finding by the court was simply that Mr. Schaefer refused to promise to carry out the fine grading and excavating when Mr. Macri

offered to turn it over to him. The court added that Mr. Schaefer continued to complain. The court concluded by saying that Mr. Schaefer's conduct was not consistent with a meeting of the minds and an express contract that Mr. Macri was to pay Mr. Schaefer the fair value of his services.

There are two very clear reasons why this finding of the court is not inconsistent with an implied-in-fact agreement on the part of petitioners to pay respondent the reasonable value of the labor and materials furnished by him.

First, a finding that there was no express contract or meeting of the minds that respondent was to perform all or a part of the fine grading, simply means that there was no bilateral contract by the terms of which respondent promised to do that work. A finding that there was no bilateral contract and consequently no promise by respondent to do the work, is clearly not inconsistent with the existence of a unilateral contract by the terms of which an agreement may be implied in fact on the part of petitioners, to compensate respondent for the work which he actually performed. It is conceded that respondent did not expressly agree to do any fine grading, but that does not mean that if, through necessity, he was compelled to do some fine grading in order to get the job done, he should not be compensated for it on the basis of a unilateral contract implied in fact.

Second, the refusal of Mr. Schaefer to undertake the excavating and fine grading was in answer to Mr. Macri's request that Mr. Schaefer take over all the ex-

cavating and fine grading, not simply that he take over the fine grading required by reason of the defective condition of the excavations.

Petitioners evidently contend further that there can be no recovery here on an implied or quasi contract, inasmuch as the rights of these parties are governed by the subcontract executed by them, at least in an amount greater than the compensation specified in such subcontract. The proposition advanced is without any merit, however, because of the fact that respondent performed additional work at the request of petitioners under such circumstances as to create a unilateral contract by petitioners to pay respondent for such work.

It is said that a recovery on the common counts, following a breach of contract, is limited to the compensation stated in the contract. This proposition is of no value to petitioners. Here, a contract or contracts arose by which petitiners agreed to pay respondent's costs and expenses, and respondent is simply seeking to enforce such contract or contracts. The proposition relied upon, therefore, has been fully met.

Petitioners also contend that respondent was not entitled to rescind the subcontract and recover in quantum meruit. Respondent did not rescind that contract, however, nor was the decision of either court below based upon a rescision. Such decisions were based upon the fact that respondent fully performed the subcontract and supplied additional labor and materials for which he is entitled to compensation.

2.

THE EVIDENCE ESTABLISHES WITH REASONABLE CERTAINTY THE AMOUNT WHICH RESPONDENT IS ENTITLED TO RECOVER

The argument under this heading is directed to petitioners' proposition 4 (Brief 31).

The decision of the Court of Appeals with respect to the amount of recovery is found in these words (173 Fed. 2d 5, 9):

> "Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed."

The statement of costs referred to by the court in that quotation is Exhibit 63, the audit prepared by a certified public accountant at respondent's request (R. 1241, 1243, 1251, 1252).

It has already been shown in the argument under heading No. 1 in this brief that respondent should be allowed to recover on three separate theories. These will now be considered separately to demonstrate that the amount of the judgment can be sustained on each.

A.

Recovery in quantum meruit of all respondent's costs and expenses, together with overhead and profit, based upon petitioners' willful and continuing breaches of the subcontract.

The District Court found that the value of the labor and materials furnished and services rendered for which petitioners were chargeable, was as shown in Exhibit 63; and the court allowed all the items set forth therein with the exception of interest and two minor items (R. 103, 104). Petitioners have not attacked the accuracy of this audit, nor have they contended that it does not show respondent's actual costs and expenses. Petitioners do contend that respondent should not be permitted to recover overhead and profit, but that contention has already been answered under subdivision A of heading 1 of this brief.

Petitioners now contend, however, for the first time, that the judgment was based upon simply a compilation, Exhibit 63, and not upon respondent's original books and records (Brief 4, 34). All of his original books and records relating to this project were produced in open court, however, and counsel for petitioners could have studied them and used them in their examination of any witness (R. 1251).

There is substantial evidence establishing the items of overhead and profit. The accountant who prepared Exhibit 63 testified that he fixed overhead at 20% of the total direct costs because the true percentage, which

he ordinarily used, was too high for a business of this kind (R. 1239, 1251, 1259, 1269). This was undoubtedly due to respondent's most unfortunate experience on this project. The accountant then stated that he computed the profit at 10% of the total of the direct costs and overhead, as most cost-plus jobs in the construction field are figured on that basis. He added that it had been respondent's practice to bill on that basis, and to include overhead in his cost (R. 1272, 1273).

It cannot be seriously contended, therefore, that respondent has not met the burden of proof with respect to the measure of his recovery on the theory set forth under this subdivision A.

It is respectfully submitted, therefore, that respondent's recovery should be computed as follows, if this theory is adopted:

(a) Respondent's total direct costs allowed by the court	$67,712.84
(b) Overhead—20% of (a)	13,542.57
(c) Respondent's total costs—(a) plus (b)	81,255.41
(d) Ten per cent profit	8,125.54
(e) Total costs, overhead and profit—(c) plus (d)	89,380.95
(f) Amount paid by petitioners	32,614.66
(g) Total amount due and unpaid—(e) minus (f)	$56,766.29

This figure varies slightly from the amount of the judgment due to an error in calculation at the conclusion of the trial.

B.

Recovery based on the principle that an injustice can be avoided only by enforcement of petitioners' promises to pay respondent's costs, and petitioners are estopped to assert that their promises are not binding upon them.

As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of respondent's costs, or only his extra costs due to petitioners' breaches of the subcontract. The District Court allowed all of respondent's costs and expenses together with overhead and profit, less what he received. In affirming the amount of the recovery, the Court of Appeals said (173 Fed. 2d 5, 9):

> "* * * the increased costs of Schaefer were properly computed by reference to this statement (Exhibit 63)."

If, under the theory set forth under this subdivision B, respondent is entitled to recover all of his costs and expenses together with overhead and profit, less what he has received, it is clear that the judgment should be affirmed, for the reasons stated in subdivision A.

If, on the other hand, respondent is entitled to a judgment for the amount specified in the subcontract, less what he received, and in addition thereto his extra costs and expenses, there is ample testimony in this record to support the judgment. The following discussion deals only with the latter recovery, i.e., for the additional costs and expenses, and the corresponding

overhead and profit.

Petitioners contend that the respondent failed to keep a separate account of his increased costs and that he failed to introduce any evidence of their extent at the trial. It is further contended that the respondent, not having met the burden of proof, is entitled to recover nothing.

The decisions cited by petitioners will be briefly considered later in this brief.

There are two answers to these contentions, although it is conceded that respondent did not keep a separate account of his extra costs.

In the first place, the breach of contract by petitioners was willful and negligent and was of such character as to render precise computations of extra costs economically and in most situations physically impossible.

The extra work done by respondent consisted in the following:

Fine grading the excavations to the proper level; removing earth from the walls of the excavations to give them more slope and permit the forms to be inserted properly; removing earth or cribbing and back-filling, where the walls were not properly excavated to the neat concrete line; removing from excavations, panels assembled into structures, when it appeared that the excavations had not been dug to the proper grade, and reassembling such panels in the excavations after additional fine grading; removing the forms under adverse

conditions after the concrete had set; taking the forms back to the yard in order that they might be rebuilt, and returning them to the next excavation; rebuilding panels to a different size because of a lack of lumber and the vertical walls of the excavations; additional use of trucks; additional use of other equipment; additional supervision, that is, a superintendent and foreman were required for a much longer period than would have been necessary under normal conditions.

It is evident that from the nature of the operation and the extra work done, it would have been economically, and in most instances physically impossible to have kept an exact account of all these extra costs. Mr. Schaefer testified that with respect to part of such extra operations it was a physical impossibility to establish a dividing line between what was work required by the subcontract and what was additional work (R. 1368).

In the second place, respondent did produce very substantial evidence of additional costs, and it is respectfully submitted that such evidence fully meets the requirements established by the Supreme Court which will be discussed.

This evidence consisted in the testimony of several witnesses and Exhibits 51 (R. 572, 578, 586) and 63 (R. 1241, 1243, 1251, 1252). Exhibit 51 shows the estimated time of performance of all aspects of his work: constructing forms, pouring concrete, and stripping the forms. It also shows the daily progress of the work by means of cumulative percentages of the total to be done

in each of these three categories. It also indicates exactly how many men were employed each day and in what work they were primarily engaged. Exhibit 63 is the audit prepared by the certified public accountant at respondent's request, setting forth all of his costs and expenses itemized by months.

Mr. L. E. Bufton, an engineer of uncommon experience in the field of concrete construction (R. 1133 to 1139), testified that after examining the specifications covering this job, the work required of respondent under the subcontract could have been performed by him, if petitioners had performed their obligations under the subcontract, in not more than four months (R. 1160, 1161, 1162). He added that to accomplish this in four months, he would need an average of 25 men per day (R. 1216), which means, assuming 25 working days in each month, 2,500 man-days would have been required.

By means of a hypothetical question setting forth the details of the conditions under which respondent was compelled to do his work, Mr. Bufton was asked how and to what extent the conditions mentioned would affect the reasonable cost and value of the performance by respondent (R. 1167, 1168, 1169). His answer was that he could not state the additional costs in dollars and cents but that he felt that the cost might be from two to three times as much as it should have been under normal conditions (R. 1172 to 1175).

Finally, Mr. Bufton said that he figured the reasonable cost and value of the performance of the work undertaken by respondent, assuming that the Macris per-

formed their obligations as required by the subcontract, would be $27.88 per cubic yard. He added that this figure included an allowance for the services of the subcontractor himself and overhead. By overhead he said he meant home office and general supervision (R. 1162, 1163, 1164). Mr. Bufton also referred to a similar project in Oregon. He said the subcontractor carrying out the concrete work in that instance had bid $30.00 per cubic yard with the understanding that he would furnish all the lumber for forms (R. 1141, 1142, 1143). Respondent here testified that his bid of $26.00 per cubic yard would have been raised to $30.00 if he had been required to furnish the lumber (R. 419). Thus their bids were in the same amount.

Mr. Darcy, respondent's superintendent, testified that if the excavations had been ready with the banks on a one-to-one slope and a lateral clearance of one foot at the foundation of the structure, and lumber had been furnished of proper quality and on time, no more than three and a half months at the very outside would have been necessary to complete the job (R. 464). Actually a year and three weeks were required.

Exhibit 51 clearly indicates that this job could have been completed within three and a half months or at least within the four months specified by Mr. Bufton, if petitioners had faithfully performed the subcontract. That exhibit shows the following actual performance by respondent during the periods indicated:

> Form setting, from Feb. 9, 1945, to Mar. 8, 1945, the most productive month—17½ per cent of

the entire job.

Pouring concrete, from Mar. 1, 1945, to Mar. 30, 1945, the final 30 days—30 per cent of the entire job.

Stripping forms, from Mar. 5, 1945, to Apr. 4, 1945, the final month—39 per cent of the entire job.

The figures demonstrate that so far as pouring concrete and then stripping the forms were concerned, operations in which respondent was not directly dependent on petitioners, respondent could have performed all of the work contemplated by the subcontract in 100 days of elapsed time. During no month was he able to construct in the excavations more than 17½ per cent of the entire number of forms required on this project, but it appears from Exhibit 51 that in seven days of actual time and eight days of elapsed time, from January 19, 1945, to January 26, 1945, respondent's men were able to set 6½ per cent of the entire number of forms, and that on each of sixteen other days, widely scattered, they set one per cent or more of the total number. It was in the setting of the forms in the excavations that the breaches of petitioners created the most serious obstacle to respondent.

Exhibit 51 establishes by means of the following computation that respondent actually demonstrated the capacity to complete the work in the same or less time and with less men than Mr. Bufton estimated:

Form setting (including yard, form setting, field repair, and trucking crews)—6½% of the work required 107 man-days.

Concrete pouring—30% of the work required 176 man-days.

Form stripping—30% of the work required 34 man-days.

All types of work—100% would require 2,346 man-days.

One other fact is worthy of mention: The ratio of respondent's demonstrated performance of 2,346 man-days to Mr. Bufton's estimated performance of 2,500, is 94/100. The ratio of respondent's bid per cubic yard of $26.00 to Mr. Bufton's estimate of $27.88, is 93/100. The significance of this fact is that it establishes that respondent's bid may properly be used as a basis for a computation of the amount for which the work could have been done.

Respondent's extra costs may be determined with reasonable certainty from the testimony and exhibits just considered, by two separate computations:

1. Based on the difference between respondent's actual, total costs and his estimated costs.

(a)	Respondent's bid, per cubic yard	$ 26.00
(b)	Respondent's estimated costs, eliminating 10% profit but not overhead—10/11 of (a)	23.64
(c)	Number of yards poured for which compensation was paid to petitioners—Exhibit 14 (R. 160)	1,356.697
(d)	Respondent's estimated costs, including overhead but not profit—(b) multiplied by (c)	32,072.32
(e)	Respondent's total, actual costs including 20% overhead — (c) of	

table in subdivision A	81,255.41
(f) Respondent's extra costs including 20% overhead—(e) minus (d)	49,183.09
(g) Ten per cent profit	4,918.31
(h) Total extra costs and profit—(f) plus (g)	$54,101.40

To this should be added, of course, the amount which remains unpaid under the subcontract.

(i) Amount required by the subcontract to be paid — (a) multiplied by (c)	$35,274.12
(j) Amount paid by petitioners	32,614.66
(k) Balance remaining unpaid — (i) minus (j)	2,659.46
(l) Total amount due and unpaid on this basis—(h) plus (k)	$56,760.86

It will be observed that this is $4.11 less than the amount of the judgment.

2. Based on Mr. Bufton's estimate that the total cost might be from two to three times as much as it should have been under normal conditions.

A figure of two and one-half was adopted in making this computation, which means that the extra costs are assumed to be one and one-half times the costs under normal conditions.

(a) Respondent's estimated costs, including 20% overhead but not profit—(d) of previous table in subdivision B	$32,072.32
(b) Total costs based on Mr. Bufton's estimate of rate increase, but respondent's estimate of costs, in-	

cluding 20% overhead—(a) multiplied by 1½	48,108.48
(c) Ten per cent profit	4,810.85
(d) Total extra costs and profit—(b) plus (c)	52,919.33
(e) Balance remaining unpaid on subcontract—(k) of previous table in Subdivision B	2,659.46
(f) Total amount due and unpaid on this basis—(d) plus (e)	$55,578.79

This is $1,186.18 less than the amount of the judgment, but it would be substantially increased by using Mr. Bufton's estimated cost of $27.88 per cubic yard, or adopting his estimated increase of three times the cost under normal conditions.

It is respectfully submitted that the evidence, as thus analyzed, fulfills the requirements of the Supreme Court with respect to the character of proof required to sustain a money judgment.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187, was an action for overtime compensation under the Fair Labor Standards Act. The Circuit Court of Appeals reversed a judgment entered in favor of the plaintiff in the District Court, for the reason that the evidence of the extent of his overtime work was conjectural. The Supreme Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, saying:

> "* * * here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies

> only in the amount of damages arising from the statutory violation by the employer. In such case, 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts.' * * * It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574, was an action under the Sherman and Clayton Acts for an injunction and to recover treble damages. The Supreme Court affirmed the judgment for the plaintiffs entered in the District Court, although the evidence of damages sustained by the plaintiffs consisted simply in a comparison of the plaintiffs' receipts before and after the defendant's wrongful acts. In reversing the Circuit Court of Appeals for the Sixth Circuit, the court said:

> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' "

Petitioners contend that respondent has not met the burden of proof established by Washington law. The cases cited by them are either inapplicable or strictly in accord with the Anderson and Bigelow cases just discussed. Respondent contends that these two decisions govern this situation rather than the law of Washington, but will consider briefly petitioners' contentions.

First, it is said (Brief 31) that the Washington Supreme Court has declared that there must be a segregation of extra costs from the costs otherwise current in performance of the subcontract. It is then inferred that since respondent made no such segregation, he is not entitled to recover.

The decision cited, *Nelson v. City of Seattle,* 180 Wash. 1, 38 P. 2d 1034, does not require a segregation of costs. The court simply remarked, in deciding that the claimant had not established his right to a recovery, that he had made no attempt to segregate his costs. The court also stated that he had included all costs in his income tax return, and that, more important, he had never made a protest to the general contractor. A further distinguishing feature is that the general contractor in that case was not guilty of willful breaches of contract of such character as to render the segregating of costs physically and economically impossible, as in the present case.

Respondent contends, therefore, that if he has met the burden of proof through introduction of other evidence, it is immaterial that he did not segregate his costs.

Second, it is contended by petitioners (Brief 32) that since respondent accepted payments throughout his performance on the basis of the compensation provided for in the subcontract, there is a presumption that he accepted such amounts in full payment for all the work done including the extras, and such presumption can be overcome only by proof of the clearest and

most convincing character.

The case cited, *Ammerman v. Old National Bank*, 28 Wash. 2d 239, 182 P. 2d 75, certainly does not establish any such proposition so far as the present situation is concerned, which these distinguishing features clearly demonstrate:

(a) That action was brought by the plaintiff against the executor of the estate of her deceased employer for services rendered to the latter during her lifetime. It is evident that this is the real basis for the decision.

(b) The employer did not promise to pay for the extra services.

(c) During the lifetime of the employer, the plaintiff made no claim or suggestion that she be compensated for such services.

The court stressed this requirement:

> "There must be evidence from which it can be inferred that while the services were being performed the plaintiff intended to charge and the defendant intended to pay."

In the present case both courts below have found that respondent intended to charge and that petitioners said they intended to pay. Petitioners well knew, furthermore, while the work was in progress, that respondent was not satisfied with the contract payments he was receiving. In January, 1945, a meeting was held in Seattle, attended by Mr. Sam Macri, Mr. Schaefer, and their attorneys, to arrive at a new price, if possible, for respondent's performance. They were unable to reach an agreement (R. 2202).

None of the remaining cases cited by petitioners merits discussion, with the exception of one, *Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America,* 182 Wash. 133, 45 P. 2d 41, in which the court held that damages for loss of future profits may be allowed if the amount of the loss is established with reasonable certainty. This is exactly the burden of proof specified by the Supreme Court of the United States in the Anderson and Bigelow cases heretofore considered.

In *United States v. Wyckoff Pipe & Creosoting Co.,* 271 U.S. 263, 70 L. Ed. 938, 46 S. Ct. 503, and others, the evidence relating to the extent of recovery was purely speculative and conjectural. It has already been demonstrated beyond doubt that in the present case the amount which the respondent is entitled to recover has been established with reasonable certainty, taking into account the willful breaches of petitioners.

C.

Recovery based on the implied-in-fact agreement of petitioners to pay respondent's costs.

It is probable that the implied-in-fact agreement is limited to an undertaking by petitioners to pay all of respondent's additional costs and expenses. Inasmuch as his claim was unliquidated, he has a right to recover in quantum meruit or by specific performance of the agreement. In either event his recovery is the same, and the evidence amply justifies the denial of the writ,

as was pointed out fully in the discussion under subdivision B.

3.

THE SUBCONTRACT PROVISION WITH RESPECT TO DELAYS CAUSED BY THE PRINCIPAL CONTRACTORS, NOW PETITIONERS, IS NO BAR TO THIS ACTION

The argument under this heading is directed to petitioners' proposition 5 (Brief 35).

Petitioners contend that this action is barred by paragraph 5 of the subcontract which is quoted in petitioners' brief, page 35, and that the respondent's only remedy was to secure additional time within which to perform his obligations.

This contention is entirely without merit and the decisions cited are wholly inapplicable for these reasons:

(a) Neither petitioners nor the Continental Casualty Company raised this question in their pleadings, nor was it presented to the Court of Appeals.

(b) Respondent is not seeking damages for delay but is attempting to recover the reasonable value of the labor and materials furnished by him to petitioners.

(c) Petitioners waived this provision of the subcontract by agreeing to pay respondent's costs, thereby leading respondent to believe that petitioners did not intend to rely upon this provision of the subcontract.

Ross Engineering Company v. Pace, 153 Fed. 2d 35 (C.C.A. 4).

(d) Paragraph 5 of the subcontract was wholly abrogated due to the fact that, upon the performance of the extra work by respondent, a unilateral contract arose by which he was to be compensated for such work.

4.

THE PRINCIPLE WHICH REQUIRES ANYONE INJURED BY A BREACH OF CONTRACT TO MAKE A REASONABLE EFFORT TO MINIMIZE HIS DAMAGES, DOES NOT PRECLUDE A RECOVERY IN THIS ACTION

The argument under this heading is directed to petitioners' proposition 6 (Brief 38).

Here again, petitioners completely ignore the findings made by the District Court and the Court of Appeals that petitioners promised to pay all of respondent's extra costs and expenses. Petitioners made such promises under such circumstances as to create a unilateral contract to pay for respondent's costs and expenses upon the performance of the extra work. Respondent performed as he was asked to do, and he did nothing he was not required to do, to complete that performance. Petitioners cannot now complain that respondent did as he was asked to do, particularly since petitioners were well aware over a period of many months that respondent was performing the extra work.

Under such circumstances it certainly cannot be said that respondent failed to minimize his damages.

5.

RESPONDENT IS ENTITLED TO A DECISION THAT HE HAS CAPACITY TO MAINTAIN THIS ACTION

The argument under this heading is directed to petitioners' proposition 7 (Brief 39).

Petitioners contend that respondent is not entitled to maintain this action for the reason that he failed to file the assumed-name certificate required by Remington's Revised Statutes of the State of Washington, Section 9976, prior to the trial. It is said that this failure on his part precludes him from maintaining this action, by reason of the provisions of Section 9980 quoted in petitioners' brief, page 39.

This contention has no merit whatever. Rule 17(b) of the Rules of Civil Procedure declares:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

Respondent resided and was domiciled in Portland, Oregon, when this action was commenced, when the amended complaint was filed and at the time of the trial. He also maintained his office in that city and state (R. 3, 178, 181).

The controlling question, therefore, is whether the law of Oregon has given respondent capacity to sue. The statutory requirements of Washington have no effect whatever upon its determination.

Counsel for petitioners have never asserted that respondent has no capacity to sue because of his failure to meet any requirement of the Oregon law. By failing to make such contention either by motion or in their answer, petitioners have waived the right to assert it.

Rule 9(a) of the Rules of Civil Procedure states:

> "It is not necessary to aver the capacity of a party to sue * * * except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to * * * the capacity of any party to sue * * * he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Respondent complied with the requirement of the first sentence of Rule 9(a). The amended complaint contains sufficient averments to show the jurisdiction of the court in that it alleges every fact upon which the jurisdiction of the District Court depends under the Miller Act, and alleges a cause of action in favor of respondent under that act.

On the other hand, counsel for petitioners have failed to comply with the requirement of the second sentence of Rule 9(a) in that they have never contended in a motion or in their answer that the law of respondent's domicile, the State of Oregon, has not conferred upon him the capacity to sue in the District Court.

All defendants had knowledge that M. C. Schaefer was an individual doing business as the Concrete Construction Company, that he was the sole owner of such business, and that he was a resident of the State of Oregon, inasmuch as these facts were alleged in paragraph II of his amended complaint, filed January 24, 1946 (R. 3). Actually, petitioners admitted that allegation in their answer (R. 13), without questioning respondent's capacity to sue.

It is established that under these circumstances petitioners have waived the right to question the capacity of respondent to maintain this action.

> *Trounstine v. Bauer, Pogue & Co., Inc.*, 144 Fed. 2d 379 (C.C.A. 2), cert. den. 323 U.S. 777.
>
> *Kucharski v. Pope & Talbot, Inc.*, 4 Fed. R. Dec. 208 (D. Ct. N.Y.).
>
> *Chemacid v. Ferrotar Corp.*, 3 Fed. R. Dec. 45 (D. Ct. N.Y.).

It was held in *Kucharski v. Pope & Talbot, Inc.*, supra, that the defendant waived its right to object to the capacity of the plaintiff to sue, by failing to raise the question until after the statute of limitations had run against the plaintiff's claim. In the present case, the Miller Act itself, 40 U.S.C.A., Section 270 b, imposes a limitation on actions brought under its provisions, of one year after the date of final settlement of the prime contract. The bar of the statute was complete, therefore, on March 31, 1946 (R. 104), approximately one year before the trial of this case was commenced. Petitioners did not raise this question until after the trial was commenced.

This strengthens the conclusion that petitioners have waived the right to raise this question.

It should be added that during the trial, before the respondent rested his case, a proper assumed-name certificate was regularly filed in Yakima County, Washington, and a certified copy of it was received in evidence as Exhibit 59 (R. 670, 673).

Petitioners contend that the state law of Washington governs this question rather than Rule 17(b) of the Rules of Civil Procedure.

Petitioners do not cite any Washington decisions, however, which establish that an assumed-name certificate filed while a trial is in progress, is not sufficient to permit the action to be maintained. This question has evidently never been decided by the Supreme Court of Washington.

Section 9980 of the Washington statutes declares that no person shall be entitled to "maintain any suit" without alleging and proving that he has filed the necessary certificate. The word "maintain" does not mean "commence," but rather "continue." Webster's New International Dictionary, Unabridged Edition, defines "maintain" as follows: "to continue or persevere in or with; to carry on; as, to maintain an attack, a correspondence, a legal action."

The statute really means, therefore, that no suit shall be continued to its conclusion unless the certificate is filed. If that is true respondent has met the requirement of this section by alleging and proving the filing

of the certificate during the trial, the amended complaint having been amended to show the filing (R. 673).

If this conclusion is unsound, respondent contends that the Rules of Civil Procedure govern and not the state law of Washington.

In the cases cited by petitioners jurisdiction was based solely on diversity of citizenship and not upon a federal statute. In the present case it is conceded by all that jurisdiction is based entirely on a federal statute. Section 270(a), of Title 40, U.S.C.A., requires a payment bond to be given by every general contractor on any public work exceeding $2,000.00 in amount. Section 270(b) of the same title permits actions to be brought on such payment bond by every person who has furnished labor or material in the prosecution of the work, and requires every action instituted under that section to be brought in the United States District Court.

Respondent is seeking to enforce rights created by federal statute, and respectfully contends that the Rules of Civil Procedure govern his capacity to sue in the District Court. Respondent was required to sue in that court and it appears conclusive, therefore, that his capacity to sue is governed solely by the rules governing procedure in that court.

6.

THE REASONS GIVEN BY THE COURT OF APPEALS IN ITS OPINION, IF INAPPROPRIATE, DO NOT FORM A PROPER BASIS FOR THE ISSUANCE OF A WRIT OF CERTIORARI

The argument under this heading is directed to petitioners' proposition 8 (Brief 41).

It is established beyond doubt, of course, that if the judgment of a trial court or an appellate court is proper, the reasons assigned by either of such courts as a basis for its judgment, are immaterial. Consequently, if a judgment is proper, erroneous reasoning is entirely harmless and cannot form the basis for a reversal of the judgment.

7.

THE FORM OF THE JUDGMENT IS NOT SUCH AS TO JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI

The argument under this heading is directed to petitioners' proposition 9 (Brief 48).

If it could be said that this judgment was not drawn with the technical nicety desired by petitioners, it is so fundamental that no part of the judgment should be paid twice by any party to this case that the Supreme Court can safely rely upon counsel to make certain that this does not occur. Principles of law come to the aid

of petitioners as surely and effectively as the terms of any judgment.

If petitioners or the Continental Casualty Company pay any sum to the Government to satisfy the tax lien arising out of respondent's indebtedness to the Government, clearly that amount will not be paid to respondent nor be demanded by him. The judgment must be deemed satisfied to the extent of such payment to the Government.

If petitioners satisfy the judgment in favor of respondent, it is clear that the judgment in favor of the Continental Casualty Company and against petitioners will be void and of no effect. If the Continental Casualty Company satisfies the judgment, it is equally clear that that company is entitled to satisfaction from petitioners, to the extent of the payment made by the Continental Casualty Company to respondent.

Respectfully submitted,

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